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THE CASE OF JOSIAH PHILLIPS.
How Virginia Came to Pass a Bill of Attainder.

BY WILLIAM ROMAINE TYREE, OF THE HALIFAX COUNTY BAR OF VIRGINIA.

In glancing over the files of Colonial legal records, one is struck with the severity of punishment meted out to the prisoner of that period. In those early days of the commonwealth, grand larceny and horse-stealing, with murder and robbery, were punished with death; and rarely were there interposed obstacles of the sentiment which pervades the criminal annals of today. Such a state of the law governing crimes as we find in America in our own generation, can only be charged to the lax system of criminal procedure which protects those of wealth and influence, and sends too swiftly to the gallows, the chair, or a nearby limb the unfortunate wretch who is unable to make a satisfactory defense—thus balancing delinquencies of one day with the undue severity of another.

But to leave this grave fault of our modern civilization and to turn to those of interest of Colonial days, is only a step of a few years to one who follows the legal maxim *stare decisis*.

For instance, there comes to light the case of one Josiah Phillips, "late of the parish of Lynhaven, in the county of Princess Anne," for long a scourge to the neighborhood in which he practised his crimes, and who was indicted by a grand jury of the General Court of Virginia on the 9th of May, in the year 1778, for *robbery*, tried, found guilty and hung.

Were this all of the *Phillips* case, the order entered by the court would be lost in oblivion among the many records of forgotten causes; but it is given prominence by reason of its being, as far as I can ascertain, the first, if not the only, bill of attainder passed in America, and which produced much censure upon Mr. Henry, whose connection with the affair he negligently vindicated. Such adverse criticism has only been removed by the lapse of time and his biographers (more particularly, William Wirt), the truth of this singular case becoming known. Mr. Randolph's subsequent attitude, however, was a most unusual one, insomuch as he raised no objection to the apprehend-

ing of Phillips under the attainder, but prepared the indictment under which he was found guilty of *robbery*; he represented the commonwealth, then, after Phillips had been found guilty and executed for robbery, he turned to attack Mr. Henry's position with regard to this case in a debate before the Convention of 1788.

The facts of the *Phillips* case are these: Phillips, in the summer of 1777, was the leader of a band of banditti which was just commencing a series of crimes in the counties of Norfolk and Princess Anne, these counties lying in the extreme eastern section of Virginia, where were resident many Tory families. This band spread terror and consternation on every hand.

Availing himself of the disaffection which prevailed in that quarter, and taking refuge from occasional pursuit in the fastness of the Dismal Swamp, he carried on a species of warfare against the innocent and defenseless, at the bare mention of which humanity shudders. Scarcely a night passed without witnessing the shrieks of women and children, flying by the light of their own burning houses, from the assaults of these merciless wretches; and every day was marked by the desolation of some farm, by robberies on the highway, or the assassination of some individual whose patriotism had incurred the displeasure of this fierce and bloody leader of outlaws. Every attempt to capture Phillips and his associates in crime seemed of no avail, for after every deprivation they would take their boats and soon be lost to all those who searched so diligently the numerous bays, inlets and swamps with which this section of the state abounds, with the additional aid, also, of those who still adhered to the Crown.

At last, Governor Henry received a letter from one Col. John Wilson, who, it seems, was then in command of the militia in the lower counties, which communication gave additional proof of the obstacles to be overcome before capturing Phillips, also of the disaffected state of the neighborhood:—

Norfolk county, May 20, 1778.

Honorable Sir:—

I received your letter on the 14th inst., of the 12th April, respecting the holding of the militia in readiness, and my at-

tention to the arms and accoutrements, which I shall endeavor to comply with as far as in my power; that much, however, may not be expected from this county. I beg to observe, that the militia, of late, fail much in appearing at musters, submitting to the trifling fine of five shillings, which, they argue, they can afford to pay, by earning more at home, but I have reason to fear, through disaffection. With such a set of men, it is impossible to render any service to country or county. A few days since, hearing of the ravages committed by Phillips and his notorious gang I ordered fifty men to be raised out of four companies, consisting of upward of two hundred: of those only ten appeared, and it being at a private muster, I compelled twenty others into duty, putting them under the command of Capt. Josiah Wilson, who immediately marched after the insurgents; and that very night one-fourth of his men deserted, Capt. Wilson still pursuing but to no purpose. They were either taken to their secret places in the swamps, or concealed by their friends, that no intelligence could be obtained. He then returned, his men declaring they could stay no longer on account of their crops. I consider, therefore, that rather than that they should wholly desert, it might be better to discharge them, and wait the coming of the Housemond militia, when I trusted something might be done: but of those men I can hear no tidings; and unless they or some other better men do come, it will be out of my power to effect anything with the militia of this county; for such is their cowardly disposition, joined to their disaffection, that scarce a man, without being forced, can be raised to go after the outlaws. We have lost Capt. Wilson since his return. Having some private business at a neighbor's, within a mile of his own house, he was fired on by four men concealed in the house, and wounded in such a manner that he died in a few hours; and this will surely be the fate of a few others, if their request of the removal of the relations and friends of those villains be not granted, which I am again pressed to solicit for, and in which case neither assistance, pay, nor plunder, is expected; conceiving that to distress their supporters is the only means by which we can rout those wretches from us, and thereby establish peace and security to ourselves and families, etc.

Upon the receipt of this, seeing the gravity of the situation, Governor Henry immediately enclosed Col. Wilson's letter to the House of Delegates, with the following communication: that though he was unwilling to trouble the General Assembly with matters which seemed of little consequence, yet, in view of the

insurrection which prevailed in Princess Anne and Norfolk counties and the serious nature of the then existing state of affairs in this section of the commonwealth, he thought it should be brought to their attention. That, from time to time, he had given orders to the commanding officers to draw from the militia a force sufficient to quell these disturbances, but that such officers had complained of the non-support and disaffection both of their own men and the inhabitants of the neighborhood. That he had ordered one hundred men to be drawn from the Housemond militia, but their total want of discipline had rendered all efforts unavailing; furthermore, that Col. Wilson's opinion was that removal of such families as were in league with the insurgents was absolutely necessary.

The Executive, admitting his own inability to cope successfully with the situation, continues: "But thinking the executive power not competent for such a purpose, he submitted the entire matter to the General Assembly, as he deemed it his duty to do so."

This letter was sent to the House on the 27th day of May, 1778, and was immediately referred to a Committee of the Whole House on the State of the Commonwealth. This committee was at once formed; but not having the time to consider the subject, had leave to again sit. The next day, the House resolved itself into a committee of the whole and, after some time, the Speaker resumed the chair, Mr. Carter reporting on the subject of Phillips, as follows:—

Information being received, that a certain Phillips, with divers others, his associates and confederates, have levied war against this commonwealth within the counties of Norfolk and Princess Anne, committing murders, burning houses, wasting farms, and doing other acts of enormity, in defiance of the officers of justice—

Resolved, That in the opinion of this committee, if the said . . . Phillips, his associates and confederates, do not render themselves to some officer, civil or military, within this commonwealth, on or before . . . day of June, in this present year such of them as fail so to do, ought to be *attainted* of *high treason*; and that, in the meantime, and before such render, it shall be lawful for any person, with or without orders, to pursue and slay, or otherwise to take and deliver to justice, the said . . . Phillips, his associates and confederates.

On the same day, pursuant to a resolution to that effect, Mr. Jefferson, Mr. Smith and Mr. Tyler were appointed and did bring in a bill which was read for the first time. On the two succeeding days, it was read a second and third time, and thus regularly passed through the forms of the lower house.

It was communicated by Mr. Jefferson to the senate on the 30th day of the month, and returned, passed by them without amendment on the 1st day of June, which was the last day of the session.

The Act, as it stands upon the statute-book of the session, is as follows:

Whereas, A certain Josiah Phillips, laborer, of the parish of Lynhaven and county of Princess Anne, together with divers others, inhabitants of the counties of Princess Anne and Norfolk, and citizens of this commonwealth, contrary to their fidelity, associating and confederating together, have levied war against this commonwealth, within the same, committing murders, etc. . . . , and still continue to exercise the same enormities on the good people of this commonwealth; and whereas, the delays which would attend the proceeding to outlaw the said offenders, according to the usual forms and procedures of the courts of law, would leave the said good people, for a long time, exposed to murder and devastation,—

Be it therefore enacted by the General Assembly, that if the said Josiah Phillips, his associates and confederates, shall not, on or before the last day of June, in the present year, render themselves to the Governor, or to some members of the privy council, judge of the General Court, justice of the peace, or commissioned officer of the regular troops, navy or militia of this commonwealth, in order to their trials for the treasons, murders, and other felonies by them committed; that, then, such of them, the said Josiah Phillips, etc. . . . , as shall not so render him or themselves, shall stand and be convicted and attainted of high treason, and shall suffer the pains of death, and incur all forfeitures, etc. . . . ; and that execution of this sentence of attainder shall be done, by order of the General Court, to be entered so soon as may be conveniently, after notice that any of the said offenders are in custody of the keeper of the public jail. And if any person committed to the custody of the keeper of the public jail, as an associate or confederate of the said Josiah Phillips, shall allege that he hath not been of his associates or confederates at any time after the first day of July, in the year of our Lord one thousand seven hundred and seventy-seven, at

which time the said murders and devastations were begun, a petit jury shall be summoned and charged, according to the forms of law, to try, in the presence of the said court, the fact so alleged; and if it be found against the defendant, execution of this Act shall be done as before directed.

And that the good people of this commonwealth may not, in the meantime, be subject to the unrestrained hostilities of the said insurgents:

Be it further enacted, That from and after the passage of this act, it shall be lawful for any person, with or without orders to pursue and slay the said Josiah Phillips, and any others who have been of his associates or confederates, at any time after the said first day of July aforesaid, and shall not have previously rendered him or themselves to any of the officers, etc. . . . *Provided*, That the person so slain be in arms at the time, or endeavoring to escape being taken.

Such was the Act that was passed by the Virginia Assembly; and which, even in those days of internal discord, called forth much censure. Still, in reading further, we will see the peculiar turn which the merits of this case of Phillips' took.

Phillips was apprehended in the course of the autumn, and indicted by Mr. Edmund Randolph, then Attorney-General, for highway robbery alone. On this charge he was tried at the October term of the General Court, convicted and executed. So, in this manner, the act of attainder was never brought to bear upon him at all, and it is for posterity to say whether Mr. Henry deserves censure in communicating to the General Assembly the letter of Col. Wilson, or whether the legislature was unduly harsh upon such a wretch as Phillips.

Be this as it may, the justice and expediency of the attainder were afterwards debated with considerable heat, in Richmond in the Convention of 1788, which convened for the purpose of discussing the fruits of the Constitutional convention which, a short time before, had met at Philadelphia. In the former Mr. Henry took a leading part as an advocate of the rights of the state of Virginia with reference to the union of the thirteen colonies then forming a federation, in which he was opposed in debate by Mr. Randolph; and in the course of that debate occurred one of the most singular instances of the fallacy of human memory, namely, relative to the *Phillips* case, ten years

before. Mr. Randolph, in answer to Mr. Henry's eulogies upon the constitution of his own state, brought to the fore that case in the following manner:—

There is one example of this violation [of the state constitution] in Virginia, of a most striking and shocking nature; an example so horrid, that if I conceived my country would passively permit a repetition of it, dear as it is to me, I should seek means of expatriating myself from it. A man, who was then a citizen, was deprived of his life thus: From a mere reliance on general reports, *a gentleman in the house of delegates informed the house*, that a certain man [Josiah Phillips] had committed several crimes, and was running at large perpetrating other crimes; he, therefore, moved for leave to attaint him; he obtained that leave instantly; no sooner did he obtain it, than he drew from his pocket a bill ready written for that effect; it was read three times in one day, and carried to the senate; I will not say it was passed the same day through the senate, but he was attainted very speedily and precipitately, without any proof better than vague reports. Without being confronted with his accusers and witnesses, without the privilege of calling for evidence in his behalf, he was sentenced to death, and was afterwards actually executed. Was this arbitrary deprivation of life, the dearest gift of God to man, consistent with the genius of a republican government? Is this compatible with the spirit of freedom? This, sir, has made the deepest impression in my heart, and I cannot contemplate it without horror.

Now, by turning to the facts of the *Phillips* case, as the reader will see from the record, there is not one word of this eloquent invective that is consistent with facts. What makes this case still more strange is that Mr. Randolph, at the happening of the occurrence to which he refers, held both the position of clerk of the house, and Attorney-General of the commonwealth; in the first character, he had, only ten years before, been officially informed that the bill of attainder had not been founded on report, but on a communication of the Governor, enclosing a letter of the commanding officer of the militia in the section which was being devastated by Phillips; that that letter in proper form had been referred to the Whole House on the State of the Commonwealth, whose resolutions led to the bill in question; and that the bill, instead of being read three times in one day, had been regularly, and according to the

forms of the House, read on three several days; while in his character as Attorney-General he had himself drawn the indictment and prosecuted Phillips for highway robbery—confronted him with the witnesses, whose names are given at the foot of the indictment, indorsed in Mr. Randolph's own handwriting; *convicted him on that charge*, on which charge alone Phillips was executed.

In justice, however, to Mr. Randolph, it behooves me to say that not only he, but others connected with the case in various capacities, even Mr. Henry, proceeded in their several criminalities and defenses upon the admission that Phillips had fallen a victim to the bill of attainder. Therefore, it is extraordinarily singular that such a lapse of memory, of the principal participants in the proceedings and trial of one of the most noted cases of that day, should have prevailed.

The chairman of the committee to which the bill was referred says:—

The case of Josiah Phillips I find strangely represented by Judge Tucker and Mr. Edmund Randolph, and very negligently vindicated by Mr. Henry Judge Tucker, instead of a definition of the functions of bills of attainder, has given a just diatribe against their abuse. [Giving a definition and proceeding with:] The court refused to pass sentence of execution pursuant to the directions of the Act.

In this manner, it was made to appear that the Assembly had transcended its powers, if we are to believe the statements of Judge Tucker and Mr. Randolph, when, as a matter of fact, Phillips was never tried under the attainder at all but only for robbery, as subsequent newspapers reports of the times will disclose.

Mr. Randolph's supposed utterances with reference to this case are excused by his charitable critic under the guise of the indulgence accorded orators when pressed by powerful adversaries in the ardor of conflict, losing sight of a close adherence to facts, permitting their imagination to be distorted and colored by the views of the moment.

His critic continues:—

He [Randolph] was Attorney-General at the time, and told

me himself the first time I saw him after the trial of Phillips, that when taken and delivered up to justice, he had thought it best to make no use of the Act of attainder, and to take no measure under it; that he had indicted him at the common law, either for murder or robbery (I forget which; and whether for both), that he was tried on this indictment in the ordinary way, found guilty by the jury, sentenced and executed under the common law; a course which everyone approved, because the first object of the act of attainder was to bring him to a fair trial. Whether Mr. Randolph was right in this information to me, or, when in the debate with Mr. Henry, he represents this atrocious offender as sentenced and executed under the act of attainder, let the record of the case decide.

It seems strange that Mr. Randolph, who surely to some extent acquiesced in the act of attainder, certainly sufficiently, as he says, "to bring him to a fair trial" (meaning Phillips), should afterwards have been so severe in censuring this Act of the Assembly; and in his reference, in the debate, to the case, "without being confronted with his accusers and witnesses, without the privilege of calling for evidence in his behalf, he was sentenced to death, and afterwards actually executed." Mr. Attorney-General must have been unduly anxious for a debate with Mr. Henry or, to use a modern phrase, "he was playing to the gallery." I take it to be the former.

One can hardly believe that in the then enlightened state of the law in Virginia, even at that early period, at whose bar were practising some of the most profound lawyers of the colonies, and whose Assembly was composed of as cultivated men as could be found in any succeeding generations there could have occurred such a mockery of justice as Mr. Randolph would have us believe. If there had been such, why did the Attorney-General propose and permit it? But if he only meant that Phillips had not the advantages of confrontation and evidence in his behalf on the passage of the bill of attainder, how absurd to charge the Assembly with the omission to confront Phillips with his witnesses, when he was standing out in arms, and in defiance of their authority, and their sentence was to take effect only on his own refusal to come in and be confronted. Mr. Randolph must have known that the prisoner was tried and executed under the common law; and yet, according to his own words in his

debate with Mr. Henry, he rests *his* defense on a justification of the Act of attainder only.

At last; to eliminate any doubt with reference to the controversy, we have the following order against Josiah Phillips entered by the General Court:

Virginia,

In the General Court, 20th October, 1778.

Josiah Phillips, late of the parish of Lynhaven in the county of Princess Anne, laborer, who stands *indicted for robbery*, was led to the bar in custody of the keeper of the public jail, and was thereof arraigned, and pleaded not guilty to the indictment, and for his trial put himself upon God and the country. Whereupon, came a jury, to wit: James Letate, Thomas Stanley, Gillingham Boothe, etc. that the said Josiah Phillips is guilty of the *robbery* aforesaid in manner and form as in the indictment against him is alleged, etc.

October the 27th, 1778.

Josiah Phillips, etc., who stands *convicted of robbery*, was again led to the bar, etc. Therefore, it is considered by the court, that he be hanged by the neck until he be dead.

Thus Phillips by the above order and arraignment was convicted and sentenced to be hung for robbery along with the following offenders for crimes, such as horse-stealing, grand larceny, etc.:

October 28, 1778.

John Lowry, John Reizen, and Charles Bowman for murder, *Josiah Phillips*, James Hodges, Henry McLalen and Robert Hodges for *robbery*, James Randolph for horse stealing, Joseph Turner, otherwise called Joseph Blankenship, for burglary, and John Highwarden for grand larceny, being under sentence of death by the judgment of the court yesterday passed against them for their said offenses: It is awarded etc. by the sheriff of York county, on Friday the fourth day of December next, between the hours of ten and twelve in the forenoon, at the usual place of execution.

Copies-Teste,

Peyton Drew, C. S. C.

Though the press of the colony was just coming into existence, nevertheless, it seems alive to passing events, as the following extract from Dixon and Hunter's paper, published in Williamsburg, Va., October 30, 1778, will attest:

Williamsburg. At a general court, begun and held at the

capitol the 10th instant, the following criminals were condemned to suffer death: Charles Bowman, from Prince George, for murder; John Lowry, from Bedford, for ditto; *Josiah Phillips*, James Hodges, Robert Hodges, and Henry McLalen from Princess Anne, *for robbery*; John Highwarden from Fauquier; for grand larceny; Joseph Turner, alias Joseph Blankenship, from Albemarle, for burglary; and James Randolph, from Culpeper, for horse stealing.

And from an extract from the same paper, dated December 4. 1778, there is an account of the execution of Josiah Phillips and those sentenced to death under the same order entered by the General Court. We can see that the death penalty was rather overdone in the case of minor offenses, public sentiment not having arisen to the plane it now enjoys at the horror of corporal punishment. And so ends the case of Josiah Phillips, around whose conviction hangs a peculiar state of lapsed memory on the part of those, with the exception of the principal actor, who were most interested.

—*The Green Bag.*